

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Inc. and BellSouth Corporation
Application for Transfer of Control

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WC Docket No. 06-74

MAR 29 2007

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FCC 06-189

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 2006

Released: March 26, 2007

By the Commission: Chairman Martin and Commissioner Tate issuing a joint statement;
Commissioners Copps and Adelstein concurring and issuing separate statements;
Commissioner McDowell not participating.

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I. INTRODUCTION

1. AT&T Inc. (AT&T) and BellSouth Corporation (BellSouth) (collectively, the Applicants) have filed a series of applications' pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (Communications Act or Act)' and section 2 of the Cable Landing License Act' in connection

¹ See Commission **Seeks Comment on Application For Consent to Transfer of Control Filed By AT&T Inc. and BellSouth Corp.**, Public Notice, WC Docket No. 06-74, DA 06-904 (rel. Apr. 19, 2006) (**Public Notice**).

² 47 U.S.C. §§ 214, 310(d).

³ 47 U.S.C. § 35; see generally **An Act** Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39 (Cable Landing License Act).

with their proposed merger. This merger would combine two regional Bell Operating Companies (BOCs). AT&T and BellSouth offer competing services in certain communications markets, and BellSouth supplies wholesale inputs relied upon by AT&T and other competitors in various retail markets. Thus, the proposed merger requires us to examine its effects on competition – which are both horizontal and vertical in nature – in a wide range of significant communications markets.

2. In accordance with the terms of sections 214(a) and 310(d), we must determine whether the Applicants have demonstrated that the proposed transfers would serve the public interest, convenience, and necessity.⁴ Based on the record before us, and as discussed more fully below, we find that the transaction meets this standard. After analyzing the record, we conclude that this merger may reduce from two to one the number of competitors with direct connections to a handful of buildings where other competitive entry is unlikely. We further find, however, that AT&T's voluntary commitment to divest at least eight fiber strands in the form of ten-year IRUs for these two-to-one buildings where entry is unlikely adequately remedies these potential harms.⁵ Moreover, to the extent that the merger increases concentration in those or other relevant markets, we find that the public interest benefits of the merger outweigh any potential public interest harms.

11. EXECUTIVE SUMMARY

3. As discussed below, our analysis of the competitive effects of the merger, which focuses on the following key services, finds that the merger is not likely, with one exception, to result in anticompetitive effects in relevant markets.

- **Special access competition.** The record indicates that, in a small number of buildings in the BellSouth in-region territory where AT&T and BellSouth are the only carriers with direct connections, and where other competitive entry is unlikely, the merger is likely to have an anticompetitive effect on the market for Type I wholesale special access services. We further find, however, AT&T's voluntary commitment to divest at least eight fiber strands in the form of ten-year IRUs for these two-to-one buildings where entry is unlikely adequately remedies these potential harms. With respect to Type II wholesale special access services, we find that a sufficient number of other competitors with similar types of local facilities will remain post-merger to help mitigate the loss of AT&T as a competitor in BellSouth's region.
- **Retail enterprise competition.** We find that the merger will not likely have anticompetitive effects for enterprise customers, even though we find that the Applicants currently compete

⁴ *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18292, para. 2 (2005) (*SBC/AT&T Order*); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18435, para. 2 (2005) (*Verizon/MCI Order*); *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, File Nos. 0002031756, *et al.*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 13976, para. 20 (2005) (*Sprint/Nextel Order*); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, para. 2 (1997) (*Bell Atlantic/NYNEX Order*); *Merger of MCI Communications Corp. and British Telecommunications PLC*, GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15353, para. 2 (1997) (*BT/MCI Order*).

⁵ See Appendix F.

against each other with respect to certain types of enterprise services and some classes of enterprise customers. We find that competition for medium and large enterprise customers should remain strong after the merger because medium and large enterprise customers are sophisticated, high-volume purchasers of communications services and because there will remain a significant number of carriers competing in the market. With respect to small enterprise customers, we recognize that AT&T continues its withdrawal from that market in BellSouth's region, and we conclude, after examining the record, that it is not exerting significant competitive pressure with respect to those customers.

- **Mass market voice competition.** We conclude that the merger will not likely have anticompetitive effects on mass market voice services. We find that neither BellSouth nor AT&T is a significant present or potential participant in this market outside of their respective regions. Consequently, we find that neither party was exerting significant competitive pressure on the other in their respective in-region territories. Moreover, we note the rapid growth of intermodal competitors – particularly cable telephony providers (whether circuit-switched or voice over IP (VoIP)) – as an increasingly significant competitive force in this market, and we anticipate that such competitors likely will play an increasingly important role with respect to future mass market competition.
- **Mass market Internet competition.** We find that the merger is not likely to result in anticompetitive effects for mass market high-speed Internet access services. Specifically, we conclude that there are no horizontal effects as a result of the proposed merger for this service because neither BellSouth nor AT&T provides any significant level of Internet access service outside of its respective region. We also conclude that, while the merger may result in some vertical integration, the record does not support commenters' conclusions that the merged entity will have the incentive to act anticompetitively in the mass market high-speed Internet access services market.
- **Internet backbone competition.** Based on the record, we are persuaded that the merger is not likely to result in anticompetitive effects in the Internet backbone market. We find that the Tier 1 backbone market is not likely to tip to monopoly or duopoly, based either on market share or on other factors, such as changes in relative traffic volumes or through targeted de-peering or degraded interconnection. Rather, we expect a number of Tier 1 backbones to remain as competitive alternatives to the merged entity. We also are not persuaded that the merger will increase the Applicants' incentive and/or ability to raise rivals' costs. Given the level of competition we expect to remain in the Tier 1 backbone market, we are not persuaded that such actions would be viable.
- **International competition.** We find that the merger is not likely to result in anticompetitive effects for international services provided to mass market, enterprise, or global telecommunications services customers. Additionally, we find that the merger is not likely to result in anticompetitive effects in the international transport, facilities-based IMTS, or international private line markets.

4. We further conclude that significant public interest benefits are likely to result from this transaction. These benefits, which are likely to flow to consumers, relate to: accelerated broadband deployment; enhancements to Multichannel Video Programming Distributor (MVPD) and programming competition; national security, disaster recovery, and government services; unification of Cingular's ownership; efficiencies related to vertical integration; economies of scope and scale; and cost savings.

5. Accordingly, based on the record, we find that the merger of BellSouth with AT&T is in the public interest and we grant the applications for transfer of control.

III. BACKGROUND

A. Description of the Applicants

1. BellSouth Corp.

6. BellSouth is a publicly traded Georgia corporation with its principal executive offices located in Atlanta, Georgia.⁶ BellSouth is the largest communications service provider in the southeastern U.S., serving substantial portions of the population within Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.⁷ It has three operating segments: the Communications Group, Wireless, and the Advertising & Publishing Group.⁸

7. **Communications Group.** Through its wholly-owned subsidiary, BellSouth Telecommunications, Inc., BellSouth provides wireline communications services, including local exchange, network access, intraLATA long distance services, and Internet services.⁹ BellSouth Long Distance, Inc., BellSouth's long distance subsidiary, provides long distance services to residential and small business customers in BellSouth's region, long distance services to enterprise customers headquartered in BellSouth's region, and wholesale long distance service primarily to Cingular Wireless LLC (Cingular).¹⁰ BellSouth served approximately 20 million access lines and almost 2.9 million digital subscriber line (DSL) customers (retail and wholesale) at the end of 2005.¹¹ BellSouth operates a regional Internet backbone in its primary service area.¹²

8. To mass market customers, BellSouth provides advanced voice, data, Internet, and networking solutions in addition to traditional local and long distance voice services.¹³ To large business and government customers, BellSouth provides both standard and highly specialized communications services and products, including voice, data, Internet access, private networks, high-speed data equipment, and conferencing services. BellSouth also provides interconnection services to other carriers.¹⁴

⁶ BellSouth Corporation, SEC Form 10-K at 3 (filed Mar. 1, 2006), available at <http://www.sec.gov/Archives/edgar/data/732713/000095014406001613/g98697e10vk.htm> (BellSouth 2005 Form 10-K).

⁷ *Id.* at 4

⁸ *Id.* at 3

⁹ AT&T/BellSouth Application, App. A at A-2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at A-3

¹⁴ *Id.*

9. *Wireless.* BellSouth's wireless business consists of a 40 percent ownership (and 50 percent management) interest in Cingular.¹⁵ BellSouth markets many of its services, including local and long distance, DSL, and satellite television, along with Cingular wireless service, as bundled offerings.¹⁶

10. *Advertising & Publishing Group.* BellSouth also is one of the leading publishers of telephone directories in the U.S.¹⁷ BellSouth's Advertising & Publishing Group publishes more than 500 directories and distributes approximately 65 million copies to residences, businesses and government agencies in the Southeast."¹⁸

2. AT&T Inc.

11. AT&T is a holding company incorporated under the laws of Delaware and has its principal executive offices in San Antonio, Texas." AT&T offers services and products to residential consumers in the U.S. and to business customers and other providers of telecommunications services in the U.S. and in 240 countries.²⁰ The services and products that AT&T offers vary by market, but they include: local exchange services, wireless communications, long distance services, data/broadband and Internet services, telecommunications equipment, managed networking, wholesale transport services, and directory advertising and publishing." In addition, AT&T has investments in communications companies with operations in 14 countries."

12. SBC Communications Inc. (SBC) was formed as one of several regional holding companies created to hold pre-divestiture AT&T Corp.'s (*i.e.*, "legacy AT&T's") local telephone companies." Originally, SBC primarily operated in five southwestern states, but it expanded its incumbent local exchange operations to 13 states through mergers with Pacific Telesis Group, Southern New England

¹⁵ *Id.*

¹⁶ BellSouth 2005 Form 10-K at 5. BellSouth has been a selling agent for DirecTV® service since August 2004. *Id.*

¹⁷ AT&T/BellSouth Application, App. A at A-3.

¹⁸ BellSouth 2005 Form 10-K at 11

¹⁹ AT&T Inc., SEC Form 10-K at 1 (filed Mar. 1, 2006), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271706000008/form10k2005.htm> (AT&T 2005 Form 10-K).

²⁰ *Id.*

²¹ *Id.* In 2004, AT&T began offering satellite television services through an agreement with EchoStar. This agreement was amended in September 2005 to an agency agreement under which AT&T continues marketing co-branded AT&T DISH Network satellite television service but receives only commission revenues when signing up future customers. *Id.*

²² *Id.* at 1. These investments include companies that provide local and long distance telephone services, wireless communications, voice messaging, data services, Internet access, telecommunications equipment, and directory publishing.

²³ *Id.* at 1

Telecommunications Corporation, and Ameritech Corporation in 1997, 1998 and 1999, respectively.” On November 18, 2005, one of SBC’s subsidiaries merged with AT&T Corp., creating one of the world’s largest telecommunications providers, and retaining the AT&T name.”

13. AT&T provides wireline telecommunications services, including local, long distance voice, switched access, and data and messaging services, on both retail and wholesale bases.” AT&T serves 19.4 million access lines, which are predominantly concentrated in its 13-state region.²⁷ AT&T offers long distance and international long distance service nationwide, as well as wholesale switched access service to other service providers.²⁸ AT&T also sells data equipment and provides various data services, such as private lines, switched and dedicated transport, Internet access, network integration, and business voice applications over IP-based networks.” AT&T’s Internet offerings include basic dial-up access service, dedicated access, web hosting, e-mail, local radio frequency internet access (commonly known as “Wi-Fi”), and high-speed access, such as DSL services.” AT&T also holds a 60 percent economic interest and 50 percent voting interest in Cingular.” Through Cingular, AT&T provides wireless services to 54.1 million customers nationwide.” AT&T markets many of its services, including local and long distance, DSL, and satellite television, along with Cingular wireless service, as bundled offerings.”

B. Description of the Transaction

14. On March 4, 2006, AT&T entered into an Agreement and Plan of Merger (Merger Agreement) with ABC Consolidation Corp., a Georgia corporation and wholly-owned subsidiary of AT&T (Merger

²⁴ *Id.* See also *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferor, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997) (*SBC/PacTel Order*); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21306, para. 29 (1998) (*SBC/SNET Order*); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control*, Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, 14737, para. 48 (1999) (*SBC/Ameritech Order*).

²⁵ AT&T 2005 Form IO-K at 1; *SBC/AT&T Order*, 20 FCC Rcd 18290 (2005).

²⁶ SBC 2005 Form IO-K at 4.

²⁷ AT&T/BellSouth Application, App. A at A-1.

²⁸ SBC 2005 Form IO-K at 4. Long distance services, as well as a number of other services, are offered both by legacy AT&T and legacy SBC entities pending completion of the companies’ integration. See *id.* at 5-6.

²⁹ *Id.* at 4-6. Network integration services include installation of business data systems, local area networking, and other data networking offerings. *Id.* at 5.

³⁰ *Id.* at 5. AT&T has approximately seven million digital subscriber lines (DSL) in service. AT&T/BellSouth Application, App. A at A-2.

³¹ AT&T/BellSouth Application, App. A at A-4.

³² *Id.*

³³ AT&T Inc., 2005 Annual Report at 10, 22 (Feb. 16, 2006), available at http://www.sbc.com/Investor/ATT_Annual/pdf/05ATTar_Complete.pdf (AT&T 2005 Annual Report).

Sub), and BellSouth." The Merger Agreement provides that Merger Sub will merge with and into BellSouth, with BellSouth continuing as the surviving corporation and as a wholly-owned subsidiary of AT&T.³⁵ Pursuant to the Merger Agreement, each share of common stock of BellSouth issued and outstanding immediately prior to the effective time of the merger will be converted into and become exchangeable for 1.325 common shares of AT&T.³⁶ BellSouth will continue to own the stock of its subsidiaries, and BellSouth and its subsidiaries will continue to hold all of the FCC authorizations that they hold prior to the merger." AT&T will become the new parent of BellSouth, resulting in the indirect transfer of control of the Commission licenses and authorizations.³⁸ The transaction also will result in AT&T obtaining affirmative control of Cingular's Commission licenses and authorizations."

15. The Applicants contend that approval of the proposed transaction is in the public interest. They assert that the merger will produce numerous public interest benefits, including: accelerated broadband deployment;⁴⁰ causing Cingular to become a more innovative and efficient competitor through unification of Cingular's ownership; enhancement of MVPD and programming competition in BellSouth's territory by virtue of AT&T's head start in that business;" improvement in services to government customers and strengthening of national security by virtue of the merged entity's network integration and an increased geographical footprint;⁴³ improved disaster response capabilities;⁴⁴ and vertical integration efficiencies flowing from the integration of BellSouth's local exchange network with AT&T's long distance network." Finally, the Applicants assert that the merger will increase innovation and investment in the telecommunications industry, as the companies will have greater incentives to invest in research and development.⁴⁶

³⁴ AT&T Inc., SEC Form 8-K at 1 (filed Mar. 4, 2006) available at <http://www.sec.gov/Archives/edgar/data/732713/000095012306002631/y18291ge8vk.htm>

³⁵ *Id.*

³⁶ *Id.*

³⁷ AT&T/BellSouth Application at 3

³⁸ *Id.*

"*Id.* at 127.

⁴⁰ See Letter from Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory, AT&T, to Kevin Martin, Chairman, FCC, WC Docket No. 06-74 at 2-3 (filed Oct. 13, 2006); see also Letter from Gary L. Phillips, AT&T, and Bennett L. Ross, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 at 4-5 (filed Oct. 27, 2006).

⁴¹ AT&T/BellSouth Application at 6-20.

⁴² *Id.* at 20-26.

⁴³ *Id.* at 28-32.

⁴⁴ *Id.* at 32-40.

⁴⁵ *Id.* at 40-46.

⁴⁶ *Id.* at 46-51.

16. The Applicants also contend that the merger will not reduce competition. The Applicants assert that there “will be virtually no increase in horizontal concentration in any relevant market.”⁴⁷ They argue that the proposed merger will “not change the structure of the wireless marketplace and thus will have no adverse effect on competition” in that market.⁴⁸ They contend that AT&T is not a major competitor in any relevant market in BellSouth’s region,⁴⁹ and that BellSouth lacks the resources to compete effectively out of its region.⁵⁰ They also contend that there are numerous other competitors in each market segment in which both Applicants compete.⁵¹ The Applicants further argue that no harm will flow from the increased geographic scope of the merged entity because “market conditions that were central to the commission’s conclusions in prior merger orders no longer exist.”⁵² Finally, the Applicants argue that the proposed transaction does not raise “benchmarking-related concerns” identified in prior Commission orders.⁵³

C. Applications and Review Process

1. Commission Review

17. On March 31, 2006, BellSouth and AT&T jointly filed a series of applications seeking Commission approval of the transfer of control to AT&T of licenses and authorizations held directly and indirectly by BellSouth, as well as the transfer of control of Cingular and its various subsidiaries and affiliates.⁵⁴ On April 19, 2006, the Wireline competition Bureau released a Public Notice seeking public comment on the proposed transaction.⁵⁵ More than 25 parties filed petitions to deny the applications or

⁴⁷ *Id.* at 54.

⁴⁸ *Id.* at 6.

⁴⁹ *See, e.g., id.* at 55, 63, 83, 105.

⁵⁰ *See, e.g., id.* at 63, 106.

⁵¹ *See, e.g., id.* at 55, 63, 82, 99.

⁵² *Id.* at 116.

⁵³ *Id.* at 121. These and other concerns are discussed *infra* Part V.I.

⁵⁴ Pursuant to section 214 of the Communications Act, AT&T and BellSouth filed applications seeking Commission approval to transfer to AT&T control of domestic and international section 214 authorizations held by BellSouth and its subsidiaries. 47 U.S.C. § 214. The Applicants also filed an application for consent to transfer control of BellSouth’s interests in submarine cable landing licenses to AT&T pursuant to section 2 of the Cable Landing License Act. 47 U.S.C. § 35. Pursuant to section 310(d) of the Communications Act, AT&T and BellSouth filed applications seeking Commission approval to transfer to AT&T control of wireless and satellite earth station licenses and authorizations held by BellSouth, various BellSouth subsidiaries, and Cingular, and filed an application for Commission approval to transfer control of Experimental Radio Service Licenses from BellSouth to AT&T. 47 U.S.C. § 310(d); *see also* Appendix B (listing licenses and authorizations subject to transfer of control). The Applicants assert that the transfer of control of the vast majority of Cingular’s licenses and authorizations will be non-substantial (*i.e., pro forma*) in nature and that the Commission’s rules and precedents require only post-consummation notification rather than advance consent for the proposed transaction. AT&T/BellSouth Application at 127-32. Nevertheless, the Applicants have filed applications seeking advance consent out of “an abundance of caution.” *Id.* at 130.

⁵⁵ *Public Notice.* The *Public Notice* set due dates of June 5, 2006 for the filing of Comments and Petitions to Deny and June 20, 2006 for Responses and Oppositions. *Id.* The Wireline Competition Bureau (Bureau) adopted

(continued....)

formal comments supporting or opposing grant of the applications.” On June 23, 2006, the Wireline Competition Bureau and International Bureau requested additional information from the Applicants.⁵⁷ The Applicants’ responses to the Information Request, along with their responses to additional Commission requests, are included in the record. On October 13, 2006, the Commission released a public notice seeking comment on certain proposals made by AT&T in a supplemental filing.⁵⁸ More than 41 parties filed comments in response to the *Voluntary Conditions Public Notice*.⁵⁹

2. Department of Justice Review

18. The Department of Justice’s (DOJ’s) Antitrust Division review telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.⁶⁰ The Antitrust Division’s review is limited solely to an examination of the potential competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. The Antitrust Division reviewed the proposed merger between AT&T and BellSouth and on October 11, 2006 announced the closing of its investigation without further action.⁶¹

IV. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

19. Pursuant to sections 214(a) and 310(d) of the Communications Act,” and sections 34 through 39 of the Cable Landing License Act,⁶² the Commission must determine whether the proposed transfer of

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protective orders under which third parties would be allowed to review confidential or proprietary documents. *See AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, Order. 21 FCC Rcd 5215 (2006) (*First Protective Order*); *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, Order. 21 FCC Rcd 7282 (2006) (*Second Protective Order*).

⁵⁶ The parties that filed formal pleadings in this proceeding are listed in Appendix A. In addition to those formal pleadings, we have received thousands of informal comments and *ex parte* submissions. All pleadings and comments are available on the Commission’s Electronic Comment Filing System (ECFS) website at www.fcc.gov/cgb/ecfs/.

⁵⁷ See Letter from Thomas J. Navin, Chief, Wireline Competition Bureau, FCC, to Wayne Watts, Senior Vice President and Associate General Counsel, AT&T, Inc., and James G. Harralson, Vice President and Associate General Counsel, BellSouth Corporation, WC Docket No. 06-74 (June 23, 2006) (Information Request).

⁵⁸ See *Commission Seeks Comment on Proposals Submitted By AT&T Inc. and BellSouth Corp.*, Public Notice, WC Docket No. 06-74, 21 FCC Rcd 11490 (2006), as amended by *Commission Seeks Comment on Proposals Submitted By AT&T Inc. and BellSouth Corp.*, Public Notice, WC Docket No. 06-74, Erratum (rel. Oct. 16, 2006) (*Voluntary Conditions Public Notice*).

⁵⁹ The parties that filed comments in response to the *Voluntary Conditions Public Notice* are listed separately in Appendix A. Comments filed on the *Voluntary Conditions Public Notice* are cited herein as “Conditions Comments.”

⁶⁰ 15 U.S.C. § 18.

⁶¹ See Press Release, DOJ, Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T’s Acquisition of BellSouth (Oct. 11, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm.

⁶² 47 U.S.C. §§ 214(a), 310(d).

control to AT&T of licenses and authorizations held and controlled by BellSouth and Cingular will serve the public interest, convenience, and necessity." In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test, weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.⁶⁵ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁶⁶ If we are unable to find that the proposed transaction serves the public interest for any reason,

(Continued from previous page)

⁶³ 47 U.S.C. §§ 34-39. The Cable Landing License Act provides that approval of a license application may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service. . . ." 47 U.S.C. § 35. The Commission does not conduct a separate public interest analysis under this statute. See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18300 n.59; *Verizon/MCI Order*, 20 FCC Rcd at 18442 n.58; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998) (*WorldCom/MCI Order*).

⁶⁴ 47 U.S.C. § 310(d) requires that we consider the applications for transfer of Title III licenses (wireless licenses and earth station authorizations in this case) under the same standard as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18300 n.60; *Verizon/MCI Order*, 20 FCC Rcd at 18441 n.59; *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-50, Memorandum Opinion and Order, 20 FCC Rcd 13053, 13062-63, para. 17 (2005) (*Alltel/Western Wireless Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21542, para. 40 (2004) (*Cingular/AT&T Wireless Order*); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, para. 18 (2004) (*News Corp./Hughes Order*). Thus, we must examine the Applicants' qualifications to hold licenses. See discussion *infra* Part V.J (AT&T's Qualifications to Acquire Control of BellSouth's and Cingular's Licenses).

⁶⁵ See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon/MCI Order*, 20 FCC Rcd at 18441, para. 16; *Sprint/Nextel Order*, 20 FCC Rcd at 13976, para. 20; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-43, para. 40; *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14046, paras. 20, 22 (2002) (*Bell Atlantic/GTE Order*); *Applications of VoiceStream Wireless Corporation and Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789, para. 17 (2001) (*Deutsche Telekom/VoiceStream Order*); *SBC/Ameritech Order*, 14 FCC Rcd at 14737-38, para. 48; *Bell Atlantic/NYNEX Order*, 13 FCC Rcd at 19987, para. 2.

⁶⁶ See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon/MCI Order*, 20 FCC Rcd at 18443, para. 16; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40 (citing, e.g., *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23251, para. 26 (2002) (*AT&T/Comcast Order*); *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar/DirectTV Order*)).

or if the record presents a substantial and material question of fact, we may designate the application for hearing.⁶⁷

20. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”⁶⁸ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.⁶⁹ Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.” In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.”

21. In determining the competitive effects of the merger, our analysis is informed by, but not limited to, traditional antitrust principles.” The Commission and the DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission’s review differ from those of the DOJ.⁷³ As stated above, the DOJ reviews mergers pursuant to section 7 of the Clayton Act,

⁶⁷ We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications. See *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979). We may, however, do so if we find that a hearing would be in the public interest. However, with respect to the applications to transfer licenses subject to Title II of the Act, if we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e); see *EchoStar/DirecTV Order*, 17 FCC Rcd at 20574, para. 25; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40.

⁶⁸ See *SBC/AT&T Order*, 20 FCC Rcd at 18301, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing, e.g., *News Corp./Hughes Order*, 19 FCC Rcd at 483-84, para. 16; *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *EchoStar/DirecTV Order*, 17 FCC Rcd at 20575, para. 26).

⁶⁹ See 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (1996 Act), 254, 332(c)(7)); 1996 Act, Preamble; *SBC/AT&T Order*, 20 FCC Rcd at 18301 para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443-44, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41; see also *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9; 2000 *Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, 22696, para. 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); cf. 47 U.S.C. §§ 521(4), 532(a).

⁷⁰ See *SBC/AT&T Order*, 20 FCC Rcd at 18301, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443-44, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing, e.g., *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9).

⁷¹ See *SBC/AT&T Order*, 20 FCC Rcd at 18301-02, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41.

⁷² See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14046, para. 23; *WorldCom/MCI Order*, 13 FCC Rcd at 18033, para. 13.

⁷³ See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; see also *Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff’d sub nom. United States v. FCC*, 652

(continued...)

which prohibits mergers that are likely to lessen competition substantially in any line of commerce.” The Commission, on the other hand, as stated above, is charged with determining whether the transfer of control serves the broader public interest. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.” In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.” We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.⁷⁷

22. The Commission has the authority to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁷⁸ Indeed, our public interest authority enables us to impose and enforce conditions based upon our extensive regulatory and enforcement experience to ensure that the merger will, overall, serve the public interest.” Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from

(Continued from previous page) _____

F.2d 72 (D.C. Cir. 1980) (*en banc*); *Nonhern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”).

⁷⁴ 15 U.S.C. § 18

⁷⁵ See *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *AT&T/Comcast Order*, 17 FCC Rcd at 23256, para. 28.

⁷⁶ See generally *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 18444 para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42.

⁷⁷ See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 1X; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550, 6553, paras. 5, 15 (2001) (*AOL/Time Warner Order*); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42.

⁷⁸ See 47 U.S.C. § 303(r); 47 U.S.C. § 214(c); see generally *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Alltel/Western Wireless Order*, 20 FCC Rcd at 13065-66, para. 21 (conditioning approval on the divestiture of operating units in specified markets); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43 (same); see also *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 (conditioning approval on the divestiture of MCI's Internet assets).

⁷⁹ 47 U.S.C. § 303(r); see, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 1Y; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Alltel/Western Wireless Order*, 20 FCC Rcd at 13065-66, para. 21; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 24; *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10; *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 17X (1968); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989).

the transaction (*i.e.*, transaction-specific harms)" and that are related to the Commission's responsibilities under the Communications Act and related statutes."

V. POTENTIAL PUBLIC INTEREST HARMS

A. Analytical Framework

23. In this section, we consider the potential public interest harms, including potential harms to competition, arising from the merger. Because AT&T and BellSouth currently compete with respect to a variety of services and groups of customers, we must consider the potential horizontal effects of this merger." In addition, because both AT&T and BellSouth provide critical inputs, particularly special access services, to various communications markets, we need to consider the potential vertical effects of the merger – specifically, whether the merged entity will have an increased incentive or ability to injure competitors by raising the cost of, or discriminating in the provision of, inputs sold to competitors."

24. With respect to the horizontal effects, consistent with Commission precedent, we first perform a structural analysis of the merger to examine whether it is likely to result in anticompetitive effects.⁸⁴ We begin by defining the relevant product markets" and relevant geographic markets.⁸⁶ We next identify market participants and examine market concentration and how concentration will change as a result of

⁸⁰ See *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43; *News Corp./Hughes Order*, 19 FCC Rcd at 534, para. 131.

⁸¹ See *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43.

⁸² A merger is said to be horizontal when the merging firms sell products that are in the same relevant markets and are therefore viewed as reasonable substitutes by purchasers of the products. *News Corp./Hughes Order*, 19 FCC Rcd at 507, para. 69.

⁸³ *Id.* at 508, para. 71. A merger is said to be vertical when one of the merging firms sells products in an upstream input market while the other merging firm sells products in a downstream output market. See *id.* at 507-08, paras. 70-71.

⁸⁴ Structural merger analysis, as the name suggests, considers structural characteristics of the merging firms and the relevant markets, such as market shares and entry conditions, to make predictions about the likely competitive effects of a proposed merger.

⁸⁵ A relevant product market has been defined as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and nontransitory" increase in price." Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12 (*DOJ/FTC Guidelines*); see also *EchoStar/DirecTV Order*, 17 FCC Rcd at 20605-6, para. 106.

⁸⁶ A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines* § 1.21).

the merger. We also consider whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increase.

25. If our structural analysis suggests that the merger may have anticompetitive effects, we must then examine in more detail whether and how the merger might affect competitive behavior. In performing this behavioral analysis, we consider whether the merger is likely to have anticompetitive effects either through unilateral actions of the merged entity or through coordinated interaction among firms competing in the relevant market.”

26. With regard to potential vertical effects, we will examine how the merger affects the Applicant’s incentives and ability to discriminate in provisioning inputs to competitors. In particular, we will consider the effect of the merger on the merged entity’s incentives and ability to discriminate in the provision of special access services.

B. Wholesale Special Access Competition

27. In this section, we consider the effects of the proposed merger on the provisioning and pricing of wholesale special access services.⁸⁸ As discussed below, wholesale special access service is a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carriers seeking to connect customers to their long distance networks, and entities seeking to connect with Internet backbones.⁸⁹

⁸⁷ *Id.* at 20619, para. 151. As the Commission explained in the *EchoStar/DirecTV Order*:

Unilateral effects arise when the merging firm finds it profitable to alter its behavior following the merger. Examples of unilateral effects include a merging firm’s raising its price or reducing the quantity it supplies. Coordinated effects, in contrast, arise when competing firms, recognizing their interdependence, take actions “that are profitable for each of them only as a result of the accommodating reactions of others.” Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership.

Id. at 20619, para. 152 (footnotes omitted).

⁸⁸ The Commission previously has defined special access as a dedicated transmission link between two places. *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*); *see also SBC/AT&T Order*, 20 FCC Rcd at 18304, para. 24; *Verizon/MCI Order*, 20 FCC Rcd at 18447, para. 24. We recognize that different companies may offer dedicated loop and transport links between two points under tariffs and contracts that bear proprietary names. *See, e.g., AT&T/BellSouth Application, Declaration of Robert W. Bickerstaff (AT&T/BellSouth Bickerstaff Decl.)* at para. 11 (listing by name several of BellSouth’s special access discount programs). For simplicity, we will use the term “special access” to refer to all services provided by any carrier that involves such dedicated links.

⁸⁹ *See infra* Part V.C (Retail Enterprise Competition); Part V.D (Mass Market Telecommunications Competition); Part V.E (Mass Market High-speed Internet Access Competition) and Part V.F (Internet Backbone Competition); *see also* Cheyond *et al.* Comments at 61-62; T-Mobile Reply at 3 (stating that T-Mobile’s provision of wireless services, which allows customers to “cut the cord,” depends on T-Mobile’s ability to obtain services and facilities from incumbent LECs such as AT&T and BellSouth); Global Crossing Comments at 3 (stating that Global Crossing “relies heavily on AT&T and BellSouth’s ‘last mile’ special access facilities to reach end-user customers” and that a significant portion of Global Crossing’s national special access purchases will be directed to the merged entity):
(continued...)

Firms needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider. As discussed below, we find that AT&T provides special access services in competition with BellSouth's special access services in BellSouth's in-region territory.” We further find that AT&T is currently the sole carrier, besides BellSouth, with a direct wireline connection to a number of buildings in BellSouth's region, so that the merger will reduce the number of competitors with direct connections to those particular buildings from two to one. We further find that competitive entry is unlikely in a small number of these buildings and that, as a result, the merger may result in anticompetitive effects with respect to that subset of buildings. AT&T has, however, voluntarily committed to divest IRUs to those buildings?’ which we find adequately remedies the potential harms.

1. Relevant Markets

a. Relevant Product Markets

28. As previously indicated, special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits. Such services are used for various purposes, such as directly connecting tenants of commercial buildings to a competing carrier's network or connecting different facilities of the same firm. Both voice and data may be carried using special access services. The facilities used to provide special access service typically consist of three different segments: (1) an entrance facility, which connects the purchasing carrier's point of presence (POP) to the nearest wire center, carrier hotel, or similar location (“entrance facility”); (2) local transport; and (3) a “last mile” connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user customer.

29. The Commission previously has found that there are at least two separate relevant product markets for special access services: “Type I” special access services, which are offered wholly over a carrier's own facilities, and “Type II” special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment.⁹² The Commission has also previously found that many purchasers of wholesale (Continued from previous page) _____

Letter from Thomas Jones and Jonathan Lechier, Counsel for TWTC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. at 4, 10 (filed Aug. 8, 2006) (TWTC Aug. 8 *Ex Parte* Letter) (stating that numerous classes of providers “must rely completely or almost completely upon RBOC last mile facilities to provide enterprise class services to businesses”); PAETEC Comments at ii (stating that PAETEC does not rely on UNEs and relies on incumbent LEC provided special access services for 95% of its last mile connections to end users).

⁹⁰ By “in-region,” we mean the franchise areas where BellSouth is the incumbent LEC. Thus, “out-of-region” refers to all other regions in the U.S.

⁹¹ See Appendix F.

⁹² See *SBC/AT&T Order*, 20 FCC Rcd at 18305, para. 26; *Verizon/MCI Order*, 20 FCC Rcd at 18448, para. 26; see also TWTC Petition at 7-8. Several commenters claim that there are “essentially no intermodal competitors in this market.” See TWTC Petition at 3; see also Consumer Federation *et al.* Reply at 32; MSV LLC Comments at 6. While we recognize that cable operators generally may not use hybrid-fiber coax to provide special access services, the record evidence suggests that, to the extent cable operators are providing competitive special access services, they do so using fiber facilities. See TWTC Aug. 8 *Ex Parte* Letter, Attach. at 9, 11-12 (explaining that cable modem service does not provide the level of service quality that most businesses require and that to provide such services cable operators largely rely on fiber facilities, citing a fiber-based service announced by Charter Communications).

special access services view Type I services as substantially superior to Type II services, due to differences in performance, reliability, security, and price, and that these differences are sufficiently large that Type I special access services fall into a separate relevant product market from Type II.⁹³

30. We also recognize that the services provided over different segments of special access (e.g., channel terminations and local transport) constitute separate relevant product markets, which may be subject to varying levels of competition.” In the competitive analysis section below, we will discuss the competitiveness of the different special access services.

h. Relevant Geographic Markets

31. Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer’s location. Since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a “small but significant and nontransitory” increase in the price of special access service.” In order to simplify its analysis, however, the Commission has traditionally aggregated or grouped customers facing similar competitive choices, and we will do so in our discussion below to the extent appropriate.”

32. In addition, however, we will consider the potential effect of the merger on BellSouth’s special access prices, which generally are set on a wider geographic basis. Because BellSouth has gained Phase II pricing flexibility for its special access services in some metropolitan statistical areas (MSAs),⁹⁷ but

⁹³ See *SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 26 n.89; *Verizon/MCI Order*, 20 FCC Rcd at 18448, para. 26 n.88. See also TWTC Petition at 7 (recognizing that Type I and II special access services are in separate product markets because “[a] carrier providing services solely over its own facilities can deliver higher quality service than a carrier that must rely on a combination of its own facilities and those of another carrier” and stating that TWTC purchases almost exclusively Type I service).

⁹⁴ Consistent with the *SBC/AT&T* and *Verizon/MCI* decisions, we find that, in general, different capacity circuits are likely to constitute separate relevant product markets as well. See *SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 26 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448-49, para. 27 n.89. However, for the reasons given in those orders, we do not find it necessary to analyze separate product markets for different capacities of special access services. See *SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448-49, para. 27 n.89.

⁹⁵ See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18307, para. 28; *Verizon/MCI Order*, 20 FCC Rcd at 18449-50, para. 28. Our geographic market definition is consistent with the arguments made by certain commenters. See, e.g., Ad Hoc Telecom Users Reply at 19 (“From a customer’s perspective, a CLEC either has facilities serving a particular building or it does not, regardless of the fiber capacity passing the building by.”); TWTC Petition at 8-9.

⁹⁶ See *SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448-49, para. 27 n.89.

⁹⁷ See, e.g., *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-20, Memorandum Opinion and Order, 15 FCC Rcd 24588 (CCB 2000) *aff’d*, *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CC Docket No. 01-22, Memorandum Opinion and Order, 16 FCC Rcd 18174 (2001); *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing No. 02-24, Memorandum Opinion and Order, 17 FCC Rcd 23725 (2002).

not others, BellSouth's rates for special access may vary from MSA to MSA.⁹⁸ Accordingly, we will also examine on an MSA basis how the merger is likely to affect BellSouth's special access prices.

c. Market Participants

33. BellSouth can access all or virtually all of the buildings and transport routes in its territory. Although the record is not clear as to the exact extent that other competitive LECs compete in the special access market in BellSouth's territory, it is clear that, in addition to AT&T, [REDACTED]⁹⁹ provide wholesale Type I, and in some cases Type II, special access services.¹⁰⁰ The record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.¹⁰¹

2. competitive Analysis

34. Consistent with the analysis adopted in the *SBC/AT&T Order* and the *Verizon/MCI Order*, we separate our discussion of the competitive effects of the merger into the effects on the in-region special access markets, both horizontal and vertical, and the effects on out-of-region special access markets. We begin by considering whether the merger is likely to result in a meaningful reduction in competition or increase in price for special access services to particular locations.

⁹⁸ See AT&T/BellSouth Application at 61 n.179 (stating that in areas where BellSouth has been granted pricing flexibility, customers of BellSouth's TAP tariff have the option of negotiating more individualized contract tariffs than are available to other similarly situated customers). We recognize that BellSouth also offers various volume and term discount plans which offer percentage discounts off the tariffed rate. Some discounts are based on a carrier's total spend over a larger geographic market while other discounts may vary from MSA to MSA. See AT&T/BellSouth Bickerstaff Decl. at para. 11 (describing certain BellSouth tariffs).

⁹⁹ In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. See *First Protective Order*, 21 FCC Rcd 5215; *Second Protective Order*, 21 FCC Rcd 7282. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order. Note that in some cases where both a confidential unredacted version and a redacted public version of a document were filed, the page number was inconsistent between the two documents. With respect to such documents, all citations are to the redacted version, unless otherwise specified.

¹⁰⁰ See Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. 2 at 6-24 (filed Sept. 1, 2006) (AT&T Sept. 1 *Ex Parte* Letter). In addition to the entities specifically enumerated above, the record indicates that a number of other competitive LECs provide voice and data services in BellSouth's region. See *id.* (listing all the competitive LECs known to AT&T that provide fiber to buildings where AT&T has direct fiber connections); AT&T/BellSouth Application at 57 n.164 (listing 20 fiber-based competitive LECs providing service in Atlanta); AT&T/BellSouth Bickerstaff Decl. at paras. 5-9 (listing various special access competitors), AT&T/BellSouth Application, App. B at B-15 to B-30 (listing and describing the services offered by numerous competitive LECs operating in BellSouth's region).

¹⁰¹ To clarify, the record contains information about buildings served by one or more competitive LECs where AT&T also serves the same building. See Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. 2 (filed Sept. 20, 2006) (AT&T Sept. 20 *Ex Parte* Letter) (revised supplemental exhibit 14.h.4). The record does not, however, clearly indicate which other individual buildings are served by one or more competitive LECs but not AT&T in the remainder of BellSouth's territory.

35. As an initial matter, the record demonstrates that BellSouth offers no wholesale Type I or Type II special access services in AT&T's in-region territory or any other area outside of BellSouth's in-region territory. Thus, the merger is unlikely to result in any anticompetitive effects in special access markets in AT&T's in-region territory.¹⁰² We therefore limit our analysis only to whether the merger is likely to result in unilateral anticompetitive effects in the provision of wholesale special access services in BellSouth's in-region territory.

36. As discussed below, we find that, with respect to Type I special access, AT&T has direct connections to approximately 317 buildings in BellSouth territory.¹⁰³ The Applicants submitted a detailed building analysis,¹⁰⁴ which analysis identifies AT&T-connected buildings that: (1) are vacant or have AT&T (or an AT&T affiliate) as the sole tenant; (2) are currently served by other competitive LECs with direct connections; and (3) have demand and cost characteristics such that entry would be likely should the merged entity attempt to raise prices after the merger.¹⁰⁵ Based on our evaluation of these submissions, we find that there are 31 buildings within BellSouth's territory where AT&T is currently the sole carrier with a direct wireline connection to the building (besides BellSouth), and where entry by other facilities-based carriers is unlikely.¹⁰⁶ AT&T has, however, voluntarily committed to divest IRUs to those 31 buildings and, for the reasons given below, we accept that commitment.¹⁰⁷

37. With respect to Type II special access services, we conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities with an incumbent LEC's special access or high-capacity unbundled loops, or a competing carrier's loop facilities, alleviates concerns about the loss of AT&T as a provider of Type II special access services to particular buildings in BellSouth's in-region territory. Further, because AT&T provides such a relatively small amount of wholesale Type II special access services within BellSouth's region, and because other competitive providers should be able to move in quickly to fill any void left by

¹⁰² Therefore, we disagree with the argument of Cbeyond *et al.* that the loss of BellSouth as a competitor in AT&T's region is likely to have anticompetitive effects. See Cbeyond *et al.* Aug. 22 *Ex Parte* Letter at 10-11; see also Letter from Denise N. Smith, Counsel for Cheyond *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. at 22 (filed Aug. 31, 2006) (Cbeyond *et al.* Aug. 31 *Ex Parte* Letter) (arguing that BellSouth had plans to enter AT&T's market and compete for special access services); Letter from Gary L. Phillips, AT&T, and Bennett L. Ross, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 at 4-5 (filed Sept. 14, 2006) (AT&T/BellSouth Sept. 14 *Ex Parte* Letter) (disputing Cbeyond *et al.*'s interpretation of the BellSouth documents cited in the Cbeyond *et al.* Aug. 31 *Ex Parte* Letter).

¹⁰³ See *infra* para. 44.

¹⁰⁴ See Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Sept. 28, 2006) (AT&T Sept. 28 *Ex Parte* Letter). According to the Applicants, the analysis set forth in the AT&T Sept. 28 *Ex Parte* Letter expands upon and corrects earlier analyses that they submitted. See AT&T Sept. 20 *Ex Parte* Letter; AT&T Sept. 1 *Ex Parte* Letter; AT&T/BellSouth Application, Declaration of Dennis W. Carlton and Hal S. Sider (AT&T/BellSouth Carlton/Sider Decl.) at paras. 108-09; AT&T/BellSouth Reply, Declaration of Dennis W. Carlton and Hal S. Sider (AT&T/BellSouth Carlton/Sider Reply Decl.) at paras. 19-20; see also AT&T Info. Req. Exh. 12.2, 14.a.5, 14.b (providing lit building lists).

¹⁰⁵ See AT&T Sept. 1 *Ex Parte* Letter at 3-7.

¹⁰⁶ See *infra* para. 44.

¹⁰⁷ See Appendix F.

AT&T, we conclude that the merger is unlikely to result in an increase in the price of Type II services within BellSouth's region.

38. We next consider whether the merger is likely to result in anticompetitive effects in the provision of wholesale special access services by increasing the incentives of AT&T and Verizon to engage in mutual forbearance within each other's territories. We conclude that the merger will not result in competitive harm in Verizon's territory. We find that a variety of actual and potential competing providers will remain post-merger to fill any void left by AT&T if the merged entity does not continue to offer wholesale special access services in Verizon's territory.

39. Finally, we consider possible vertical effects of the merger. BellSouth already is a vertically integrated company. We conclude that the merger is not likely to increase significantly the Applicants' incentives to discriminate against rivals, including with respect to services provided to Cingular's rivals. To the extent that the Applicants, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.

a. Horizontal Effects

40. *Unilateral Effects.* Certain commenters claim that the present merger likely would result in increased wholesale special access prices at specific buildings where AT&T currently is offering Type I and Type II special access services.¹⁰⁸ The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where AT&T is currently connected via its own facilities, and that, of those buildings, there is a small number where AT&T is the sole carrier with a direct connection (besides BellSouth) and where entry is unlikely.¹⁰⁹ The elimination of AT&T as

¹⁰⁸ See, e.g., Cbeyond *et al.* Comments at 74 ("In those cases where only AT&T and BellSouth have deployed facilities to a particular building, the merged firm would obviously obtain a monopoly over local transmission serving that building. It is hard to conceive of a clearer example of competitive harm caused by a merger."); Consumer Federation *et al.* Petition, Declaration of Mark N. Cooper and Trevor Roycroft (Consumer Federation *et al.* Cooper/Roycroft Decl.) at 40-44; COMTEL Petition at 8; TWTC Petition at 20-23 (urging the Commission to conclude that the merger would result in harm to consumer welfare in any case where, post-merger, fewer than four competitors supply fiber to a building); Sprint Nextel Comments at 11-12. See also Cbeyond *et al.* Comments at 66 (arguing that the "loss of AT&T as a reseller of BellSouth local transmission inputs would itself likely seriously harm competition" for wholesale special access services because other competitors would be unlikely to obtain the level of volume and term discounts "AT&T likely receives today off BellSouth's month-to-month tariffed prices," making other competitors less likely to resell such tariffed services and thus they would not "pose as significant a competitive threat as AT&T").

¹⁰⁹ The Applicants' experts estimate that there are 219,000 commercial buildings in BellSouth's region with more than ten DSO line equivalents. See AT&T/BellSouth Carlton/Sider Decl. at para. 117. The Applicants conclude that AT&T provides Type I service to fewer than 350 buildings in BellSouth's region as a whole -- less than 0.2%. See AT&T Sept. 28 *Ex Parte* Letter, Attach. 10. The Applicants present much of their quantifiable data in the following 11 metropolitan areas: Atlanta, GA; Birmingham, AL; Charlotte, NC; Chattanooga, TN; Greensboro, NC; Jacksonville, FL; Knoxville, TN; Miami, FL; Nashville, TN; Orlando, FL; and Raleigh-Durham, NC. See AT&T Sept. 28 *Ex Parte* Letter, Attach. 10; AT&T/BellSouth Carlton/Sider Decl. at para. 103 n.118; see also AT&T/BellSouth Reply at 14 ("AT&T operates local fiber networks in only 11 BellSouth metropolitan areas."). Our use of the term "MSA" in this Order refers to these 11 metropolitan areas, the boundaries of which are not necessarily coterminous with the boundaries of the Metropolitan Statistical Areas as defined by the Office of Management and Budget.

a provider of Type I special access services to these buildings poses a potential competitive harm. AT&T has, however, voluntarily committed to divest IRUs to these buildings and we find that it is in the public interest to accept that commitment. With respect to Type II special access services, we find that the merger is not likely to result in anticompetitive effects in the provision of Type II services. Competing carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.

41. *Type I Services.* In the *SBC/AT&T Order* and the *Verizon/MCI Order*, the Commission found that the proposed mergers posed a potential anticompetitive harm in buildings where AT&T was the sole carrier besides SBC in SBC's territory or MCI was the sole carrier besides Verizon in Verizon's territory and where entry by other competitive LECs was unlikely.¹¹⁰ The Commission further found, however, that divestitures ordered by the DOJ as part of its consent decrees with the merging parties adequately remedied those harms.¹¹¹

42. In the DOJ/AT&T/Verizon Consent Decrees, the DOJ found potential competitive harm and ordered divestitures only in buildings where "AT&T and SBC or MCI and Verizon, respectively, were capable of supplying local private lines before the merger and no other competitive LEC was likely to connect the building to its network."¹¹² In identifying buildings where divestiture was required, the DOJ began by identifying buildings in the SBC and Verizon territories where the merger would reduce the number of competitors with direct connections (or laterals) from two to one.¹¹³ Adopting criteria used by individual competitive LECs in deciding whether it was economic to build, the DOJ then developed "screens" to identify whether competitive entry was likely at each two-to-one building.¹¹⁴ The DOJ then

¹¹⁰ See *SBC/AT&T Order*, 20 FCC Red at 18308, para. 32; *Verizon/MCI Order*, 20 FCC Red at 18451, para. 32.

¹¹¹ Proposed Final Judgment, *United States v. SBC Communications Inc. and AT&T Corp.*, Civil Action No. 1:05CV02102 (D.D.C. filed Oct. 27, 2005) (DOJ-SBC/AT&T Consent Decree); Proposed Final Judgment, *United States v. Verizon Communications Inc. and MCI, Inc.*, Civil Action No. 1:05CV02103 (D.D.C. filed Oct. 27, 2005) (DOJ-Verizon/MCI Consent Decree). The DOJ-SBC/AT&T Consent Decree and the DOJ-Verizon/MCI Consent Decree are hereinafter referred to together as the "DOJ/AT&T/Verizon Consent Decrees." The DOJ/AT&T/Verizon Consent Decrees currently is under review pursuant to 15 U.S.C. § 16 (the Tunney Act) in the U.S. District Court for the District of Columbia. We agree with AT&T that it would be inappropriate to delay our consideration of this merger during the pendency of the Tunney Act proceeding. See Letter from Gary L. Phillips, AT&T Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Oct. 24, 2006).

¹¹² See Decl. of W. Robert Majure at 14, *United States v. SBC Communications, Inc. and AT&T Corp.*, Civil Action No. 1:05CV02102 at 14, n.17 (D.D.C. Aug. 7, 2006) (public redacted version) (DOJ Majure Decl.); see also DOJ/AT&T/Verizon Consent Decrees, App. A (listing divestiture assets).

¹¹³ Dept. of Justice Submission in Response to the Court's Minute Order of July 25, 2006, *United States v. SBC Communications Inc. and AT&T Corp.*, Civil Action No. 1:05CV02103 at 8 (D.D.C. Aug. 9, 2006) (public redacted version) (DOJ Aug. 9 Submission); DOJ Majure Decl. at paras. 13-14.

¹¹⁴ DOJ's screens were based on estimates of "revenue opportunity (based on current traffic being generated in the building adjusted for special circumstances) and the distance to the closest CLEC fiber," which represented the likely cost of construction. DOJ Majure Decl. at para. 14. More specifically, the DOJ used the following "demand/distance" screens to eliminate from the list of potentially problematic buildings those where the demand was at or above a minimum threshold and where a competing carrier had fiber facilities within the corresponding distance:

(continued. ...)

required divestiture of at least eight fiber strands in the form of ten-year IRUs for those two-to-one buildings where entry was found to be unlikely."¹¹⁵

43. In various filings, Applicants assert that AT&T's presence in BellSouth's region is significantly smaller than was legacy AT&T's presence in SBC's region and that "the impact of this merger on potential wholesale special access competition is truly *de minimus* and does not warrant the condition\ agreed to in the SBC/AT&T and Verizon/MCI merger[s]."¹¹⁶ In further support of their contention that divestitures and other conditions are unwarranted, the Applicants filed detailed data that identify the buildings in BellSouth's region where AT&T has direct connections."

(Continued from previous page)

<u>Minimum Demand</u>	<u>Distance</u>
2 DS3s	0.1 mile
1 OC-12	0.25 mile
Over OC-48	1 mile

Id. at n.17. In addition, the DOJ eliminated certain buildings where there was unlikely to be competition in the future, such as where the only customer in the building was AT&T or one of its affiliates. *Id.*

¹¹⁵ DOJ Aug. 9 Submission at 10-11, 13.

¹¹⁶ See AT&T/BellSouth Reply at ii-iii. The Applicants further contend that the number of buildings that raise competitive concerns under the criteria DOJ used in the SBC/AT&T merger proceeding is less than 10% of the buildings subject to similar concerns in the earlier proceedings. *Id.* at 13-17; AT&T Sept. 1 *Ex Parte* Letter at 7-13; AT&T Sept. 20 *Ex Parte* Letter at 3; see also AT&T/BellSouth Application at 56-59 (asserting that: AT&T's annual wholesale local private line sales in the BellSouth region are less than the monthly sales legacy AT&T provided in SBC's region; AT&T sells less than 1% of the billions of dollars of total wholesale special access services sold annually in BellSouth's region; and AT&T's sales are less than one tenth the amount that AT&T pays to the other competitive LECs that sell wholesale special access services to AT&T in BellSouth's region); AT&T/BellSouth Carlton/Sider Decl. at paras. 103-12.

"See AT&T Sept. 28 *Ex Parte* Letter; AT&T Sept. 20 *Ex Parte* Letter; AT&T Sept. 1 *Ex Parte* Letter; AT&T/BellSouth Carlton/Sider Decl. at paras. 103-12; AT&T/BellSouth Carlton/Sider Reply Decl. at paras. 19-26. See also AT&T Info. Req., Exh. 12.2, 14.a.5, 14.b. We primarily rely on the Applicants' most recent data submissions because the Applicants have continued to investigate building-specific issues and to refine their data submissions throughout this proceeding.

44. In their most recent submission, the Applicants present an updated, detailed building analysis.¹¹⁸ This analysis indicates that AT&T has a direct connection to 317 buildings in BellSouth's in-region territory.¹¹⁹ The Applicants first eliminate 44 buildings, which "merely house 'network' connections, are vacant buildings, or have AT&T (or an AT&T affiliate) as the sole tenant,"¹²⁰ leaving a total of 273 buildings. The Applicants next subtract buildings where other competitive LECs have direct connections, reducing the list of potentially problematic buildings to 72.¹²¹ The Applicants then apply

¹¹⁸ The Applicants' initial building list indicated that AT&T had Type I connections to 355 buildings in BellSouth's territory. See AT&T Sept. 1 *Ex Parte* Letter at 2, Attach. 1. In addition, AT&T initially identified twelve other buildings to which AT&T had a Type I connection in its response to the Information Request, which buildings were not included in the initial list because they "were added (or planned to be added) to AT&T's building database after AT&T pulled the data for its response to Specification 14.h." See AT&T Sept. 20 *Ex Parte* Letter at 1; AT&T Info. Req., Exh. 14.a.5. The Applicants suggest that four of the 17 buildings originally listed in AT&T Info. Req., Exh. 14.a.5 should be added to the building list because they are buildings "at which both AT&T and BellSouth actually have local fiber connections." See AT&T Sept. 28 *Ex Parte* Letter at n.3. The Applicants further suggest that the eight remaining buildings originally listed in AT&T Info. Req., Exh. 14.a.5 should not be added to the building list because: two actually are located in Sprint, not BellSouth, incumbent franchise areas; three were listed in AT&T Info. Req., Exh. 14.a.5, due to a database error, and in fact are not served by AT&T local fiber; and three are served by AT&T local fiber but are not connected to BellSouth's local networks. *Id.* We agree that we should exclude from our analysis of Type I special access services buildings that are not located in BellSouth's franchise areas and where AT&T has no facilities. We decline, however, to exclude from our competitive analysis buildings where AT&T has a fiber connection simply because BellSouth currently does not have a connection. BellSouth, as the incumbent LEC in its in-region territory, both has a ubiquitous network and is subject to certain "carrier of last resort" obligations. While the record is unclear as to the exact nature of such "carrier of last resort" obligations under relevant state law, we are unwilling, without more, to conclude that BellSouth would not be willing or required to build out facilities to such buildings upon request. Finally, we note that two buildings originally were listed as "No Longer Active" in AT&T Info. Req., Exh. 14.a.5, and concur with AT&T's suggestion that one be included in AT&T's list of 359 buildings and one excluded because it is not served by AT&T local fiber. See AT&T Info. Req., Exh. 14.a.5; AT&T Sept. 28 *Ex Parte* Letter at n.3. We therefore begin our analysis with an initial list of 362 buildings of potential competitive concern, and note that our numbers, as a result, vary at times from those contained in the AT&T Sept. 28 *Ex Parte* Letter and previous submissions.

¹¹⁹ AT&T states that 3 I buildings should be removed from the initial list of 362 buildings of potential competitive concern because they were duplicate entries. See AT&T Sept. 1 *Ex Parte* Letter at 2; AT&T Sept. 28 *Ex Parte* Letter, Attach. 2 (identifying duplicate buildings). AT&T further states that it has no facilities to 14 of the remaining 331 buildings, and no lit fiber to two additional buildings. See AT&T Sept. 28 *Ex Parte* Letter at 2-3, Attach. 3 (identifying 14 buildings with no AT&T fiber connection and two "buildings where AT&T's local fiber connection has not been cut, but where AT&T has no customer, no service and no electronics . . ."). We agree that we should exclude from our analysis of Type I special access services buildings where AT&T has no facilities. We reject, however, AT&T's suggestion that buildings to which it has a direct fiber connection but which are not "lit" are, for that reason alone, not of potential competitive concern. Accordingly, contrary to AT&T's suggestion, we do not drop from our analysis the two buildings identified in Attach. 3 of the AT&T Sept. 28 *Ex Parte* Letter as "buildings with no AT&T electronics installed." See AT&T Sept. 28 *Ex Parte* Letter, Attach. 3. With that exception, we otherwise agree that these 45 buildings (*i.e.*, 31 duplicate entries and 14 buildings with no facilities) should be dropped because it is not appropriate to treat them as AT&T buildings in BellSouth's in-region territory. We therefore find, based on the record evidence, that AT&T has direct connections to 317 buildings in BellSouth's region.

¹²⁰ See AT&T Sept. 1 *Ex Parte* Letter at 3-4 (explaining why these 44 buildings raise no competitive concerns); AT&T Sept. 28 *Ex Parte* Letter, Attach. 4 (identifying the 44 buildings).

¹²¹ See AT&T Sept. 1 *Ex Parte* Letter at 4-5 (explaining why these buildings raise no competitive concerns); AT&T Sept. 28 *Ex Parte* Letter, Attach. 5 (identifying the 201 buildings eliminated).

the demand/distance screens used by the DOJ in the DOJ/AT&T/Verizon Consent Decrees to eliminate buildings where competitive LEC entry is likely.” Application of these screens leaves only 31 buildings where AT&T is the only competitive LEC with a direct connection and where entry is unlikely.

45. With respect to these 31 buildings, the Applicants argue that divestiture or conditions are unwarranted. Specifically, the Applicants argue that anticompetitive effects are unlikely because: (1) AT&T does not provide any wholesale services to any of these buildings; (2) fixed wireless is a low-cost alternative to AT&T’s fiber; (3) under the Commission’s impairment test, DS1 and DS3 UNE loops remain available in the wire centers that serve these buildings; and (4) BellSouth prices special access on at least an MSA basis, and the elimination of AT&T as a competing provider of Type I special access to 31 buildings spread over nine metropolitan areas in five states is unlikely to have a significant effect on BellSouth’s pricing in any MSA.¹²³ Applicants further argue that one building has OC-96 or greater demand and is less than two miles from the existing local fiber of other competitive LECs.¹²⁴

46. We find that the Applicants’ use of the various screens to eliminate particular buildings as being of no competitive concern, as described above, is, for the most part, both reasonable and consistent with the approach the DOJ adopted in the DOJ/AT&T/Verizon Consent Decrees. Specifically, we find it appropriate to eliminate those buildings where: (1) the listing is duplicative or AT&T lacks a direct connection; (2) there are other competitive LECs with direct connections (*i.e.*, those buildings that will not suffer a two-to-one reduction); (3) the building is vacant or the sole customer is AT&T or one of its affiliates; or (4) entry by a competitive LEC is likely under the DOJ’s demand/distance screens.

47. We are not persuaded, however, by the Applicants’ arguments that six of the buildings should be deemed to be of no competitive concern because: (1) three are not connected to BellSouth’s local networks; (2) two are not served by “lit” fiber; and (3) one has OC-96 or greater demand and is located less than two miles from the existing local fiber of other competitive LECs.¹²⁵ Elimination of buildings on such grounds is not dictated by the approach the DOJ adopted in the DOJ/AT&T/Verizon Consent Decrees, and the Applicants have failed to provide record evidence sufficient to justify eliminating these six buildings. We therefore find that there are a total of 31 buildings in BellSouth’s in-region territory where AT&T is the only competitive LEC with a direct connection and where entry is unlikely.¹²⁶

48. We also do not accept the Applicants’ arguments that divestiture or conditions are unwarranted with respect to the remaining 31 buildings. In particular, we do not agree that, just because AT&T currently is not providing wholesale Type I special access services to a particular building, AT&T would

¹²² See AT&T Sept. 1 *Ex Parte* Letter at 5-7 (explaining why these buildings raise no competitive concerns); AT&T Sept. 28 *Ex Parte* Letter, Attach. 6, Attach. 7, Attach. 8 (identifying 41 buildings captured by the demand/distance screens).

¹²³ See AT&T Sept. 1 *Ex Parte* Letter at 7-9; AT&T Sept. 20 *Ex Parte* Letter at 3.

¹²⁴ See AT&T Sept. 20 *Ex Parte* Letter at 2.

¹²⁵ See *supra* notes 112-13; AT&T Sept. 20 *Ex Parte* Letter at 2.

¹²⁶ Of these 31 buildings, ten are located in Miami, seven in Atlanta, seven in Nashville, and two in Knoxville. Birmingham, Charlotte, Chattanooga, Jacksonville and Orlando each have one such building. See AT&T Sept. 28 *Ex Parte* Letter at n.3, Attach. 3, Attach. 9 (identifying 26 buildings in Attachment 9, two buildings in [REDACTED] as “buildings with no AT&T electronics installed”) in Attachment 3, and three buildings in [REDACTED] “not connected to BellSouth’s local networks” in n.3).

not do so in the future, absent the merger. Second, while we agree that fixed wireless offers the potential of being a cost-effective substitute for fiber as a last-mile connection to commercial buildings, we recognize that fixed wireless connections are not always technically or economically feasible (*e.g.*, a particular building may not be well positioned relative to a wireless provider's transmission equipment), and Applicants have failed to demonstrate that fixed wireless connections are feasible at all of the 31 buildings. Finally, even if DSI and DS3 UNE loops are available in the wire centers associated with the 31 buildings, those UNEs may not be adequate substitutes for AT&T's existing fiber connections. For example, a carrier that might have sought to purchase an AT&T Type I special access circuit absent the merger might not qualify to lease UNEs due to UNE use restrictions or demand levels.

49. We conclude that elimination of AT&T as a provider of Type I special access services at those 31 buildings may lead to an increase in the wholesale cost of special access at those buildings, and, ultimately, to higher retail prices for customers located in those buildings. AT&T has, however, offered a voluntary commitment to divest at least eight fiber strands in the form of ten-year IRUs for these 31 two-to-one buildings where entry is unlikely.¹²⁷ We note that this divestiture commitment, which is consistent with the DOJ's actions in the SBC/AT&T and Verizon/MCI mergers and,¹²⁸ consistent with our analysis in the *SBC/AT&T Order* and the *Verizon/MCI Order*, adequately remedies these potential harms. Accordingly, we accept AT&T's commitment.

50. *Type II.* In buildings in BellSouth's in-region territory where a competitive LEC is not directly connected to a building via its own facilities and where customer demand may not justify the construction of competitive facilities (such as where demand is less than the OCn level), competing carriers can combine their own transport facilities with special access loops or, where available, high-capacity loop UNEs purchased from BellSouth¹²⁹ (*i.e.*, Type II offerings). More specifically, competitors can use their existing collocation facilities in the relevant wire center, or they can contract with a competitor that has such collocation facilities. They can then use these collocation facilities to interconnect special access loops or UNEs to their own transport facilities.¹³⁰

¹²⁷ See Appendix F.

¹²⁸ See *supra* para. 42.

¹²⁹ While DSI and DS3 UNEs are not available solely for the provision of long distance or mobile wireless services, they are available for the provision of local exchange and exchange access services, subject to specific demand limitations. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 at 2551-58, paras. 34-40 (*Triennial Review Remand Order*). Carriers that obtain UNEs for the provision of local exchange or exchange access services may also provide other services using those UNEs as well. 47 C.F.R. § 51.309(d).

¹³⁰ We decline Access Point *et al.*'s request that we prohibit the merged entity from recalculating its business line density for purposes of determining UNE availability in BellSouth's territory. See Access Point *et al.* Petition at 68-69 (stating that "CLECs could be harmed if UNEs were to become less available because of changes in wire center business line counts insofar as lines that AT&T obtained from BellSouth as special access are excluded from current line counts, but would be recounted as BellSouth lines"). We do not believe that the merger is likely to have an effect on business line density counts. The Commission's rules define "business line" for purposes of determining UNE availability as "an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC." 47 C.F.R. § 51.5; see also *Triennial Review Remand Order*, 20 FCC Rcd at 2677, App. B (adopting the definition of "business line"). While the Commission's rules specifically exclude from the definition of "business line" non-switched special access

(continued....)

51. We find that existing competitive collocations and the threat of competitive entry through collocation allow for special access competition in BellSouth's in-region wire centers where AT&T competes today. Indeed, in the 11 MSAs in BellSouth's territory where AT&T currently has local facilities, the Applicants indicate that AT&T has collocations in only [REDACTED] wire centers, compared to the total of over [REDACTED] collocations by other competing carriers in those same BellSouth wire centers in which AT&T has collocations." Thus, other competing carriers collectively have over [REDACTED] times the number of BellSouth wire center collocations compared with AT&T. In addition, there are over [REDACTED] other competing carriers that collectively have between [REDACTED] collocations, with an average of [REDACTED] collocations, in each of the 11 BellSouth MSAs where AT&T has local network facilities.¹³² In none of these 11 MSAs do competitors have less than [REDACTED] times as many collocations as AT&T, and in seven of these MSAs competitors have between [REDACTED] times as many collocations as AT&T.¹³³ Moreover, of the [REDACTED] wire centers in the 11 MSAs in BellSouth's territory in which AT&T has collocations other competing carriers are collocated in [REDACTED], and [REDACTED] of these wire centers have at least [REDACTED] other competitive LECs with fiber-based collocations.¹³⁴ Even in those wire centers where AT&T currently is the only collocated carrier, competitors after the merger are likely to have incentives to construct substitute collocations." The extensive local fiber networks already deployed by other competitors in BellSouth's territory indicate that these Competitors are likely to find it feasible to construct additional collocations.¹³⁶

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lines, the rule includes "only those access lines connecting end-user customers with incumbent LEC end-offices for switched services." See 47 C.F.R. § 51.5(1)-(2). Thus, we expect that any AT&T special access lines that currently are excluded from BellSouth's business line density calculations would also be excluded under the Commission's rules post-merger. Even if that were not the case, we would not grant Access Point *et al.*'s request. The Commission's aim when it defined "business line density" for purposes of determining UNE availability was to permit all parties to rely on an "objective set of data that incumbent LECs already have created for other purposes" and to create a proxy that "fairly represents the business opportunities in a wire center." See *Triennial Review Remand Order*, 20 FCC Rcd at 2595, para. 105; see also 47 C.F.R. § 51.5 (stating that "business line" includes the "sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements"). We believe that adopting a merger condition that would depart from the Commission's rules in BellSouth's territory and exclude from the definition of "business line" for the merged entity all special access lines currently provided by AT&T would not serve the Commission's regulatory goals as set forth in the *Triennial Review Remand Order*.

¹³¹ There are minor differences in the collocation data supplied by AT&T and BellSouth. In the analysis above, we rely on the data supplied by AT&T for its own collocations, and on data supplied by BellSouth for competitive LEC collocations. See AT&T Info. Req., Exh. 14.a.4; BellSouth Info. Req., Exh. 13.b, 13.c.

¹³² See AT&T Info. Req., Exh. 14.a.4; BellSouth Info. Req., Exh. 13.b, 13.c.

¹³³ See AT&T Info. Req., Exh. 14.a.4; BellSouth Info. Req., Exh. 13.b, 13.c.

¹³⁴ See AT&T Info. Req., Exh. 14.a.4; BellSouth Info. Req., Exh. 13.b, 13.c.; see also AT&T/BellSouth Carlton/Sider Reply Decl. at para. 26; AT&T/BellSouth Reply at 25.

¹³⁵ We therefore deny PAETEC's request that we require Applicants to divest transport routes to any wire center where AT&T is the only competitive LEC that is collocated at that wire center. See PAETEC Comments at 8.

¹³⁶ See, e.g., Letter from Gary L. Phillips, Gen. Atty. and Asst. Gen. Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-34, Attach. (filed Aug. 22, 2006) (providing maps of competitive fiber deployment in BellSouth's territory) (AT&T Aug. 22 *Ex Parte* Letter). See AT&T Aug. 22 *Ex Parte* Letter, Attach.

(continued....)